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A Legal Basis for Corporate Long-Termism

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In February 2016, the CEO of BlackRock Inc., Laurence Fink, issued his [annual letter](#) to the CEOs of S&P 500 corporations. In this letter, three specific requests were made. The first was that corporations should move away from short termism to focus on long term goals. The second was that corporations should enhance their disclosure of long-term plans and include more quantifiable targets. The third was that corporations should bring a sharper focus on environmental, social and governance (ESG) matters. With this letter, Larry Fink joined a chorus of calls for corporations to consider focusing on long term horizons and extended time periods of performance evaluation.

There seems to be some support for this proposition in the United Kingdom. Section 172(a) of the UK Companies Act 2006 obliges a director to 'act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to the likely consequences of any decision in the long term'. This notion of having regard to the long term seems to have been borne out of a shift towards the 'enlightened shareholder approach' in the United Kingdom.

While a more thorough judicial treatment of Section 172(a) is awaited, directors under pressure of quarterly profit reporting may be unwilling or unable to take into account the true ramifications of their actions on climate change, which is usually measured and predicted over hundreds of years into the future.

The well-being of generations yet to come must necessarily be an important concern for the present. As an extension of Rawls' 'just savings' principle, one of the arguments for sustainable development is that of intergenerational equity - the idea that future generations must have the same access to natural resources as the present generation.

My recent paper attempts to reconcile the divergent positions of the shareholder and stakeholder primacy debate by proposing that directors- acting for the corporation- should preserve intergenerational equity. Three arguments are presented in course of this proposition.

Firstly, there has been a slew of judgments in UK common law which suggest that courts are reticent to recognize fiduciary duties that directors may have towards shareholders. The primary reason for this is that the assets controlled, administered and managed by directors belong to the corporation as a legal entity separate from its shareholders. As a result, directors have a higher fiduciary duty to the corporation and future shareholders, over that of present shareholders.

Secondly, corporations are perpetual in nature or, at least, are designed to be, and their continuing existence is predicated upon the ability of individual owners to transfer their ownership. This aspect of corporate perpetuity is little discussed, but of considerable significance in conjunction with fiduciary duties to corporations.

If directors owe their primary duty to the corporation, they must ensure -to the best of their abilities- that the corporation is maintained in good condition throughout. This forms the legal basis of protection to future shareholders. Since the survival of the corporation is paramount compared to the investment of the shareholder, directors are under an obligation to preserve the corporation.

Finally, in order to safeguard the interests of future shareholders, corporations must necessarily strive to preserve the natural and social environments upon which the future of the corporation and the wealth of future shareholders depends. Businesses must, therefore, either create sustainable methods of harvesting resources, or move to an alternative. Failure to do so would result in non-viability and consequent 'extinction' of the business itself.

This proposition does not deride the basic need of the shareholder to receive monetary benefits from the corporation. Instead, drawing from Rawls' 'just savings principle', it establishes a sense of intergenerational equity between shareholders.

The act of owning shares is largely choice-based. Shareholders may purchase and sell shares at will. Thus, it could be argued that a company that does not care for its future

shareholders will gradually see a decline in shareholder interest and eventually die a natural death. However, that is simply another way of saying that companies which are not preserved for the future, will not have one.

As a result, it is possible for corporations to contribute to a Rawlsian idea of justice and intergenerational equity by ensuring that future shareholders have as much of an opportunity to generate wealth as present shareholders do.

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